



Mwangi & 11 others v County Government of Nakuru & another (Cause 50 of 2017) [2023] KEELRC 2308 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEELRC 2308 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 50 OF 2017
DN NDERITU, J
SEPTEMBER 28, 2023**

BETWEEN

**BERNICE WAMBUI MWANGI 1ST CLAIMANT
MIRIAM WAITHERA KIARIE 2ND CLAIMANT
SHEILA MOHANJA GWEYANI 3RD CLAIMANT
PETER MWANGI NJAGI 4TH CLAIMANT
JOEL MBARIA NJORA 5TH CLAIMANT
KETTER GEORGE KIBICHII 6TH CLAIMANT
BEATRICE WANJA MURAYA 7TH CLAIMANT
JOEL WAWERU NJOGU 8TH CLAIMANT
PAGLIACCA 9TH CLAIMANT
SAMUEL KAMAU NJAU 10TH CLAIMANT
DANIEL KIBET SAMOEI 11TH CLAIMANT
SAMMY KARURI MBICI 12TH CLAIMANT**

AND

**THE COUNTY GOVERNMENT OF NAKURU 1ST RESPONDENT
NAKURU COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT**



JUDGMENT

I. Introduction

1. In a further amended memorandum of claim dated 5th July, 2021 filed through Gordon Ogola, Kipkoech & Co Advocates the Claimants pray for the following –
 - a. That this Honourable Court do find in favour of the claimants and Order the Respondents to pay each of them owing dues as follows:
 - i. Salary from February, 2016 to date
 - ii. House allowance from February, 2016 to date
 - iii. Commuter Allowance from February 2016 to date
 - b. A declaration that the Claimants' dismissal and/or termination of their employment was wrongful, unfair, unconstitutional and unlawful hence null and void ab initio.
 - c. An order for reinstatement or re-engagement of the Claimants to employment with back pay and with no loss of seniority, privileges, salaries, allowances and benefits.
 - d. In the alternative to (c) above, compensation for unlawful and unfair termination equivalent to 12 months gross salary.
 - e. In the alternative to ((b) & (c) above and in addition to (d) above, payment in lieu of notice.
 - f. An order for compensation by way of general damages to the claimants for unfair termination.
 - g. Costs of the suit and interest.
2. In a joint amended response to the claim dated 22nd October, 2021 filed by the County Attorney the Respondents deny each and every allegation raised by the Claimants and pray that this cause be dismissed with costs.
3. Both sides filed lists of documents and copies of the listed documents which they relied on and produced as exhibits during the hearing of the cause.
4. This cause came up for hearing in open court on 8th March, 2022 when the Claimants' cause commenced with the 1st, 2nd, 3rd, and 4th Claimants (CW1 to CW4) testifying. Further, on 31st May, 2022 the 5th and 6th Claimants testified (CW5 and CW6), while the 7th, 8th, 10th, and 11th Claimants (CW7 to CW10) testified on 19th September, 2022.
5. The defence was heard in open court on 3rd October, 2022 with Joyce Njeri Ndegwa (RW1) testifying for both the Respondents.
6. Counsel for both sides addressed and summed up the positions taken by the parties by way of written submissions. Counsel for the Claimants filed submissions on 26th October, 2022 while counsel for the Respondents filed on 6th December, 2022.



II. The Claimants' Case

7. The Claimants' case is contained in the further amended memorandum of claim, the oral and documentary evidence adduced through the Claimants who testified and the written submissions by their Counsel, as summarized hereunder.
8. In their pleadings, the Claimants allege that they were in October, 2015 employed by the 1st Respondent through the 2nd Respondent either as survey porters, development control officers, physical planners, or development assistants at such monthly salaries as set out in the claim. The 1st, 2nd, 3rd, 4th, and 5th Claimants allege that they were engaged as survey porters, 6th Claimant as a physical planner, 7th as a development control assistant, 8th as a physical planner, 9th as a development control assistant, 10th as a development control assistant, 11th as a survey porter, and 12th as a development control assistant. All the Claimants allege that they were engaged in October, 2015 and started working in November, 2015.
9. All the Claimants allege that their last salary was paid in January, 2016 and thereafter the 1st Respondent failed and or refused to pay as and when the same fell due and payable.
10. It is alleged by the Claimants that as from May, 2021 the Respondents advertised and filled the positions held by the Claimants rendering the Claimants constructively terminated when coupled with the alleged failure by the 1st Respondent to pay the monthly salaries.
11. It is the Claimants' case that the termination was unfair and unlawful for violating various provisions of the law including Articles 41 and 47 of the Constitution and Sections 45 and 46 of the Employment Act (the Act).
12. The Claimants had issued an authority to the 1st Claimant dated 9th February, 2017 to testify on their behalf but when the matter came up for hearing all the Claimants except the 9th and 12th testified in court.
13. In their respective testimonies in court the Claimants reiterated the alleged facts as pleaded above based on their respective filed statements praying to court that they be relieved as prayed in the claim. The 1st Claimant produced all the documents filed by the Claimants as exhibits (1 to 40) as contained in the list dated 9th February, 2017 and the supplementary list dated 5th July, 2021.
14. In cross-examination the 1st Claimant admitted that she did not attend an interview prior to her appointment as a survey porter but she nonetheless received a letter of appointment. She alleged that she made her application for the job through the 2nd Respondent after locating an advert of the position on their website but she did not avail a copy of her application. She admitted that while her letter of appointment dated 1st October, 2015 indicates that she had been recruited as a survey porter her letter of deployment dated 2nd November, 2015 indicates that she was to work as a plans clerk based in Bahati Sub-County. She produced a pay-slip for the month of January, 2016 which assigns her the designation of a messenger. She did not avail any evidence to confirm that indeed the salary against this pay-slip was paid to her and no evidence was adduced to confirm that salary for any other month was ever paid to her by the Respondents. She alleged that she worked without a salary from February, 2016 to sometimes in 2019 when he stopped reporting to work for non-payment of salary.
15. The 2nd Claimant's testimony was a replica of that of the 1st Claimant. She did not undergo an interview but allegedly got a letter of appointment. She alleged that she worked from November, 2015 until sometimes in July, 2017 when she quit the job. Her letter of appointment dated 1st October, 2015 indicates that she was recruited as a survey porter but her letter of deployment to Molo Sub-County



- indicates that she was to perform clerical duties. Her alleged pay-slip for January, 2016 indicates her designation as support staff supervisor.
16. The 3rd Claimant alleged to have attended an interview with the 2nd Respondent on 9th September, 2015 for the position of development control officer. While her letter of appointment and deployment indicates that she was allegedly appointed and deployed as a development control officer, her submitted pay-slips for the months of December, 2015 and January, 2016 designate her as a land survey assistant. She did not avail a copy of her application for either of the two positions above and no evidence was adduced confirming payment of any salary.
 17. The 4th Claimant stated that he applied for the position of development control officer after he came across an advert in the local dailies. He alleged that he attended an interview for the position on 9th September, 2015 and that he was subsequently issued with a letter of appointment. He admitted that while his alleged letter of appointment dated 1st October, 2015 and that of deployment to Nakuru Town West Sub-County indicate his designation as above, his submitted pay-slips for December, 2015 and January, 2016 designate him as land surveyor assistant. He neither provided evidence of or copy of his application for either of the positions mentioned above nor evidence of payment of the salary mentioned above into his account or any other place or point on his instructions.
 18. The foregoing scenario is replicated in the evidence by the 5th who stated that he applied for the vacancy of a survey porter, was not interviewed, but received letters of appointment and deployment. He claimed that he worked between November, 2015 to sometimes in 2018 but was only paid for one month. He did not avail any evidence of payment of salary for the one month as alleged.
 19. The 6th Claimant stated that he was appointed a physical planner vide a letter dated 1st October, 2015 and was paid salary for November and December, 2015 and January, 2016 via his bank account. He stated that he stopped working in August, 2016 due to non-payment of salary by the Respondents. The only pay-slips availed allegedly for the months of December, 2015 and January, 2016 designate him as a land surveyor. No evidence of payment of salary into the account of the Claimant was availed.
 20. As for the 7th Claimant her letters of appointment and deployment indicate that she was engaged as a development control assistant but her availed pay-slip allegedly for the month of January, 2016 designates her as land surveyor. No evidence of payment of salary into her account was availed. She allegedly worked until October, 2016 but stopped working in November, 2016 due to non-payment of her salary.
 21. The 8th Claimant alleged that he was engaged as a physical planner and that he worked from November, 2015 to August, 2016. He alleged that he was paid his monthly salary until January, 2016. He stated that he applied for the job after sighting an advert on the website of the 2nd Respondent and that he was invited for an interview which he attended and was subsequently issued with the letters of appointment and deployment. He testified that he had no copy of the application that he made for the job and he could not recall the date of his interview. While his letters of appointment and deployment designate him as a physical planner, the pay-slip he availed in court for the January, 2016 designates him as land surveyor. No evidence was availed for payment of the alleged salary into his account.
 22. The 9th Claimant did not testify in court but the documents availed in court indicate that she was appointed as a development control assistant but neither a letter of deployment nor pay-slip was availed to prove employment.
 23. The 10th Claimant stated that he applied for the position of development control officer. He alleged that he was invited for an interview that took place at the lands office, Nakuru, on a date that he cannot recall, and that he later on received a letter of appointment. Like all the other Claimants he did not



avail a copy of his application for the job. He alleged that he worked from November, 2015 to June, 2016 and that he was paid for three months. However, the pay-slip that he availed for the month of January, 2016 is not in his name, Samuel Kamau Njau, as the same is in the name of Charles Njau Kamau. No explanation was offered for this discrepancy and even then, the pay-slip designates the said Charles as a land survey assistant. No evidence was adduced to prove that indeed any salary was paid into his account by the Respondents.

24. The 11th Claimant stated that he applied for the position of a survey porter after he saw an advert in the local dailies. He applied, but did not avail a copy of his application, and later on received a call to pick a letter of appointment having not gone through an interview. He admitted that he did not write to accept or acknowledge the appointment. He alleged that he was paid salary for the months of November and December, 2015 and January, 2016. However, he alleges that he continued to work without pay until August, 2018 when he decided to stop working without pay. He alleged to have misplaced his original pay-slips and did not avail evidence for payment of his salary by the Respondents.
25. The 12th Claimant did not testify in court. His filed letter of appointment indicates that he was recruited as a development control assistant and deployed to Njoro Sub-County. There is no evidence adduced to prove that he was paid any salary by the Respondents.
26. It is against the foregoing background that the Claimants are seeking for the orders set out in the introductory part of this judgment. The submissions by their counsel shall be considered alongside those by counsel for the Respondents in the succeeding parts of this judgment.

III. The Respondents' Case

27. The Respondents' case is hinged on the amended response to the claim, the oral and documentary evidence adduced through RW1, and the written submissions filed by their counsel. The same is summarized hereunder.
28. In the joint amended response to the claim the Respondents deny that the Claimants were recruited and or employed as alleged or at all and put the Claimants to strict proof thereof. It is denied that vacancies for survey porters and development control assistants were declared and or advertised. Consequently, the Respondents deny that the Claimants are entitled to the reliefs sought.
29. Further, and without prejudice to the foregoing, the Respondents posit that if the Claimants were engaged as alleged, which is however denied, the engagement was irregular, fraudulent, and illegal. The particulars of fraud are pleaded in paragraph 6 of the amended response to the claim. It is pleaded that the letters of appointment and deployment, and the pay-slips presented by the Claimants are forged, false, and or fraudulent as the Claimants were never procedurally and lawfully recruited as employees of the 1st Respondent. It is further pleaded that none of the Claimants were interviewed for the positions they allege to have been recruited to as required under the Constitution, County Government Act, and the principles, guidelines, policies, and manuals on public service.
30. It is pleaded that since the Claimants were not employees of the 1st Respondents at any time or at all they cannot be compensated as that would amount to sanitization of an illegality. It is stated that the claimants did not give any service to the Respondents and as such there are no employment records in their regard and there is no evidence for payment of salaries to the Claimants, or any of them, or at all.
31. In court, RW1, secretary to the 2nd Respondent, testified for and on behalf of both the Respondents and produced the eight documents filed by the Respondents as exhibits 1 to 8.
32. She testified that in 2015 the department of lands of the 1st Respondent declared vacancies in various positions and in accordance with the law the 2nd Respondent started the recruitment process. She



produced an indent dated 5th June, 2015 for the vacancies and the adverts as placed on the website of the 2nd Respondent and in the print media. She was categorical that no vacancies were declared for survey porters or development control assistants. She stated that none of the Claimants were interviewed or recruited for any of the positions advertised. She produced a list of 15 candidates of those who were interviewed and recruited.

33. She stated that the interviews were conducted by the 2nd Respondent in its offices at Giddo Plaza, Nakuru Town, and no interviews took place at any other place or venue, including the lands office. She stated that the 2nd Respondent did not have an officer in the name of Eric Ogada among its ranks during the material time or indeed any other time. It had been alleged by some of the Claimants that an officer by that name interviewed and or handed appointment and or deployment letters to them.
34. It is on the basis of the foregoing that RW1 posited that the letters of appointment and deployment, and the pay-slips availed by the Claimants are a forgery and fraudulent. She clarified that it is not possible for any person to be employed in public service without undergoing a competitive recruitment process that includes an interview session. She stated that there is no evidence that any monies were paid to the Claimants against the fraudulent pay-slips that were produced in court by some of them.
35. She clarified that pay-roll numbers are allocated by the National Government and as such she could not confirm whether the numbers in the pay-slips availed by the Claimants were genuine or not. However, she stated that unlike the situation that obtained in 2015 it is currently not possible to obtain a pay-roll number without confirmation from the employer. She testified that there are no records of employment of any of the Claimants as they were never recruited as claimed or at all. She stated that the discrepancies in the letters of appointment and deployment and the pay-slips, coupled with lack of evidence of payment of salary confirm that indeed the Claimants were never recruited and or employed as alleged.
36. It is on the foregoing basis and backdrop that the Respondents pray that the Claimants' cause be dismissed with costs. The submissions by counsel for the Respondents shall be considered in the succeeding parts of this judgment alongside those by counsel for the Claimants.

IV. Issues For Determination

37. This court has carefully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and the written submissions by counsel for both parties. From the above the court identifies the following issues for determination–
 - a. Were the Claimants recruited and deployed (employed) by the Respondents as alleged?
 - b. If (a) above is in the affirmative, were the Claimants constructively terminated by the 1st Respondent as alleged?
 - c. If (a) and (b) above are in the affirmative, are the Claimants entitled to the reliefs prayed for?
 - d. What orders are appropriate for costs?

V. Employment

38. The first issue for determination above is core and so central in this cause. If the court finds that there was no employer/employee relationship between the 1st Respondent and the Claimants this cause ends there as there was nothing capable of being terminated and consequently the issue of compensation in any form or manner does not arise.



39. I have not enjoyed hearing this cause as it brings to the fore many of the human resource management issues that have dogged most of the devolved governments since their inception. Hardly does a month go without a news item on “ghost workers” and bloated workforce or fake persons in the payroll of many a public bodies and institutions, and more so the county governments. This cause should probably form a case study on the endemic and perennial issues concerning and relating to taking stock and auditing of the human capital and payroll in public bodies. Could it be that there are persons who work for public bodies yet they were not procedurally and lawfully employed? Could it be that there are persons who receive salaries yet they do not offer any services or who were indeed not legally recruited and employed in the first place? Is it probable that public bodies and institutions, including both National and County Governments, pay out millions of shillings each month to what are commonly referred to as “ghost workers”? Is it about time that all public bodies’ and governments’ human capital is meticulously audited to end perennial loses in salaries and wages paid to persons who do not serve and deserve?
40. This judgment is not intended to give answers to the above rhetorical questions but probably this cause illustrates a trend that should be brought to a logical end not only in county governments but also at the national level and in all public bodies and institutions.
41. The Claimants herein claim to have been recruited by the 2nd Respondent to work for the 1st Respondent in the positions alluded to in the foregoing paragraphs of this judgment. None of the Claimants has availed a copy of the application made for the respective position; none has proved attending an interview; none has availed a letter accepting the appointment; none has availed evidence of attending and performing work; and none has availed evidence of payment of salary. For avoidance of doubt a pay-slip is not evidence of payment of salary. Evidence of payment of salary is to be found in confirmation that the amount indicated in the pay-slip was actually paid to the employee either through a bank account or any other acceptable mode of payment. Yet all the Claimants alleged that they were paid salary for some months but no evidence of proof of payment of such salaries was availed.
42. The Respondents have availed records of the persons who were shortlisted, interviewed, and recruited for the specific positions. As per the records, none of the Claimants was recruited in that process. The Claimants have not availed the alleged advert for the vacancies pursuant to which they allegedly applied for the respective positions. It is on the basis of the foregoing that the Respondents have pleaded that the letters of appointment and deployment as well as the pay-slips produced by the Claimants are fraudulent. RW1 clarified that payroll numbers are allocated by the National Government and as such it was upon the Claimants to prove that indeed the said numbers are genuine. No evidence was availed to that effect. RW1 was categorical that the said letters did not emanate from either of the two Respondents.
43. It is submitted by counsel for the Claimants that the letters of appointment and deployment, alongside the pay-slips are prima facie evidence of existence of employer-employee relationship between the Claimants and the 1st Respondent. This argument is flawed on several fronts. First, none of the Claimants availed a copy of the application that they made and none of them attended an interview and there is no evidence of payment of salary. Secondly, none of the Claimants availed any evidence of acceptance of the position to which they were allegedly appointed.
44. Jobs in the public service which are in most instances permanent and pensionable are not easy to come by in Kenya. No wonder most applicants for such jobs keep and retain copies of their applications and letters of acceptance of appointment as trophies and retain dates and venues of interviews and other related matters almost permanently edged in their mind like beautiful souvenirs.



45. To state what should be rather obvious no person should be employed in the public service at whatever level without undergoing a competitive process including an interview.
46. Some of the Claimants alleged that they obtained their letters of appointment and deployment from one Eric Ogada. The Respondents are categorical through RW1 that no such person was ever employed or authorized by either of the Respondents to conduct the recruitment process or to issue the alleged letters.
47. Counsel for the Respondents has cited Article 235(1) of the Constitution, Section 59(1) of the County Government Act on the role of the 2nd Respondent in recruitment of employees for the 1st Respondent. Further, counsel has cited Sections 65 and 66 of the County Government Act in emphasis of the principles that the 2nd Respondent must consider in recruitment based on Articles 10, 27, 56, and 232 of the Constitution. Counsel has also cited Kilelson Mutai v The Governor Bomet County & 2 Others (2021) eKLR and Jackson Cheruiyot Rono v County Secretary, Bomet County Public Service Board & Another (2017) eKLR in affirming the legal position that un-procedural and irregular appointment is unlawful and illegal ab initio.
48. It was incumbent upon the Claimants to prove that they were indeed procedurally, regularly, and lawfully recruited by the 2nd Respondent to serve the 1st Respondent in the positions alleged by each one of them. In the considered opinion of this court the Claimants failed miserably in this legal burden of proof. It is the finding of this court that the letters of appointment and deployment, as well as the pay-slips produced by the Claimants were either forged or fraudulently obtained rendering the same unlawful, illegal, null and void, *ab initio*.
49. It is the finding and conclusion of this court that there was never created an employer-employee relationship between the 1st Respondent and the Claimants and on that score this entire cause shall collapse and die and the same is hereby dismissed.
50. The foregoing paragraphs explain why I stated that I have not enjoyed hearing this matter. During the hearing RW1 informed the court that the Respondents have not investigated this matter to unearth the truth as to who was involved in issuing the letters of appointment and deployment and the pay-slips to the Claimants without them being lawful employees of the 1st Respondent. It is the high time that the Respondents took up the matter to its logical conclusion so that those culpable may be brought to book and held to account. All the Claimants were categorical that they have not been investigated or charged with any criminal offences in regard to their now unlawful and illegal obtaining of letters of appointment, deployment, and pay-slips.
51. With the above finding, it would be an exercise in futility for this court to indulge in determining the other issues framed above. If there was no employer-employee relationship between the Claimants and the 1st Respondent there was nothing capable of being terminated, constructively or otherwise, and nothing was indeed terminated. Mutatis mutandis the issue of compensation does not arise and all the prayers are consequently and accordingly dismissed.
52. The court directs that the Deputy Registrar causes a copy of this judgment to be served upon the chief executive officer of the Council of Governors for information and reflection with a view of prompting the Governors to initiating authentic audit and screening of all employees in their respective counties. The vital legal and moral lesson from this cause is that it is possible to have names of persons who were not interviewed or recruited imposed in the payroll and such fictitious persons earn salaries and allowances without offering any services or adding value to public institutions or bodies.



VI. Costs

53. Costs follow event and the Respondents are awarded costs of this cause.

VII. Disposal

54. In final disposal of this cause, this court issues the following orders: -

- a) A declaration be and is hereby issued that the Claimants were not and have never been recruited by the 2nd Respondent as employees of or to serve the 1st Respondent.
- (b) An order be and is hereby issued dismissing the entire claims by all the Claimants.
- (d) The Respondents are awarded costs of this cause.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 28TH DAY OF SEPTEMBER, 2023.

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DAVID NDERITU

JUDGE

